IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-572

UNITED STATES PAROLE COMMISSION, ET AL.,
Petitioners

v.

JOHN M. GERAGHTY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL CLIENT COUNCIL, INC. AND THE JACKSON, MISSISSIPPI CHAPTER OF THE GRAY PANTHERS

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BRIEF AMICUS CURIAE

INTEREST OF AMICI CURIAE AND STATEMENT PURSUANT TO RULE 42.2 OF THE RULES OF THE SUPREME COURT

National Client Council, Inc. is a non-profit corporation representing low-income clients of publicly and privately-funded legal services organizations. Low-income clients from all regions of the United States elect the Board of Directors of National Client Council, Inc., at least two-thirds of whom must be low-income persons eligible

for the legal representation by the legal services organizations. These low-income clients are directly and uniquely affected on a consistent and continuous basis by policies and regulations of federal and state welfare, housing and health agencies and of regulated institutions, such as public utilities, nursing homes, mental institutions, juvenile institutions, local courts and departments of motor vehicles.

The Jackson, Mississippi Chapter of the Gray Panthers is a membership organization of elderly residents of the Jackson, Mississippi area. They have many of the same interests as the clients of National Client Council, Inc., but are especially affected by nursing home and medicaid policies and regulations.

When disputes arise concerning the legality under federal law of these policies and regulations or of the state enabling statutes, the class action device is critical for insuring that the federal courts adjudicate these federal legal questions affecting many people similarly situated. Named plaintiffs in class suits to enforce these rights can be and have been selectively granted their individual rights, raising mootness issues. The prospect of death of an elderly named plaintiff, which would moot his personal claim and perhaps the class claim, is ever present. Thus, both National Client Council, Inc. and the Jackson, Mississippi Chapter of the Gray Panthers have a strong interest in the issue of class action mootness which will be directly affected by the resolution of the mootness question before the Court in this case.

Express consent to file this brief *amicus curiae* has been given by all parties to this suit. The original letter from each counsel is filed herewith.

SUMMARY OF ARGUMENT

Where there is clear injury in fact to the named litigant initially, Article III does not require continuous personal stake by the named litigant in all suits. *Roe* v. *Wade,* 410 U.S. 113 (1973); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Rather, continued Article III justiciability turns on continued concreteness of issues and adverseness of interests. *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Baker* v. *Carr,* 369 U.S. 186 (1962).

In class suits, concreteness of issues and adverseness of interests as to the class claim are subsumed within the Fed. Rule Civ. Proc. 23(a) prerequisites, which can be satisfied without regard to whether the representative who initially was injured in fact loses his personal stake. *Sosna* v. *Iowa,* 419 U.S. 393 (1975). Denial of the representative's Rule 23(c)(1) motion for class "certification" does not inherently destroy concreteness or adverseness; class "certification" and class "denial" are creatures of current federal procedure, not constitutional requisites. *Hansberry* v. *Lee,* 311 U.S. 32 (1940). Thus, in proper class suits, where the Rule 23(a) elements are present, the case is justiciable under Article III.

In this case, the nexus between Respondent's facts and the facts of at least a subclass of the pleaded class, and the continued vigorous advocacy of the absentees' interests by class counsel, are evident. The case should be remanded to the district court for a proper Rule 23(c)(1) determination.

ARGUMENT

I. ARTICLE III DOES NOT REQUIRE THE REPRESENTATIVE IN A SUIT FILED AS A CLASS ACTION TO MAINTAIN A PERSONAL STAKE AT ALL TIMES IN ORDER TO APPEAL THE INITIAL CLASS DENIAL.

A. Article III Justiciability Turns On Concreteness Of Issues And Adverseness Of Interests Rather Than Continued Personal Stake Of The Named Parties.

The federal judicial power extends to "cases" or "controversies" under Article III, a limitation excluding "moot" cases. *Franks* v. *Bowman Transp. Co., Inc.*, 424 U.S. 747, 754-56 (1976); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The words "cases" and "controversies" confine federal court business to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968).

Most commonly, the requisite Article III "case" or "controversy" is provided when the named parties have and continue to have sufficient personal stake in the outcome of the immediate controversy so that a judicial order can redress the personal injury. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). However, numerous lines of Supreme Court cases have established that such a continuous personal stake by the named parties is not always the constitutional requisite.

A personal stake by the named parties is entirely unnecessary in certain representative suits such as where a litigant is an organization seeking to assert the rights of its members, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *see Warth* v. *Seldin*, 422 U.S. 490, 511 (1975); or where the litigant has a legal duty to absentees with a personal stake, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (parochial school asserting rights of students). And once judicial power is properly invoked, the need for continuous personal stake by the plaintiff, even in non-representative suits, is virtually extinct if the challenged conduct will continue in the future, such as where the issue is "capable of repetition, yet evading review," *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (abortion statute); where there is "voluntary cessation" of allegedly illegal conduct, *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see County of Los Angeles* v. *Davis*, ___ U.S. ___, 59 L.Ed. 2d 642, 649 (1979); where the litigant raises *"jus tertii"* constitutional claims of third parties, *Craig* v. *Boren*, 429 U.S. 190, 195-96 (1976) (statutory bar to 18-20 year old males buying liquor); and where the case involves a justiciable issue of continued government action, *Storer* v. *Brown*, 415 U.S. 724 (1974); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969) (statutory restrictions on independent candidates' nominating petitions); *see Super Tire Eng'r. Co.* v. *McCorkle*, 416 U.S. 115, 126 (1974).[1]

In all such cases, attenuation of continued personal stake is permissible under Article III because there was clear injury in fact from a specific factual occurrence that will likely recur in similar fashion, giving the suit concreteness.

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[1] *See also* Davis. *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 470 (1970); Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1037-38 (1968); Berger, *Standing to Sue in Public Actions. Is it a Constitutional Requirement?* 78 Yale L. J. 816 (1969); Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv. L. Rev. 373, 377 n.22 (1974); Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 438 n.74 (1974).

Compare with O'Shea v. *Littleton*, 414 U.S. 488 (1974); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974) (abstract injury insufficient).

Thus, the named parties' continued personal stake is but the most common, but not the constitutionally exclusive, means for a court to insure that the case satisfies Article III. Rather, Article III requires a "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); quoted in *Franks* v. *Bowman Transp. Co., Inc., supra.*, 424 U.S. at 755. Thus, in proper cases it is concreteness of issues and adverseness of interests that satisfies Article III by insuring that the questions are presented both in a specific factual setting that focusses the issues and in an adversary context. *Flast* v. *Cohen, supra; Baker* v. *Carr, supra.*

B. In Proper Class Suits, Concreteness Of Issues And Adverseness Of Interests Are Present Regardless Of Whether The Representative's Claim Is Alive At The Time Of Certification Or Whether The Class Was Denied Or Properly Certified.

Based on this well-established Supreme Court authority, it was entirely consistent for the Court to hold in *Sosna* v. *Iowa*, 419 U.S. 393 (1975) that the representative's loss of her personal stake did not deprive the Court of Article III justiciability to hear the merits of the proper class suit. *See* also *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975); *Franks* v. *Bowman Transp. Co., Inc., supra; Swisher* v. *Brady*, 438 U.S. 189, 213 n.11 (1978). *Sosna* clearly established that class "certification" under Fed. Rule Civ. Proc. 23(c)(1) before the representative's loss of personal stake is *sufficient* to avoid mootness if the suit continues to be a proper class action; but *Sosna* neither addressed nor answered whether class certification preceeding loss of the representative's personal stake is *necessary* to preserve Article III justiciability.

Amici suggest that focussing on the timing of the representative's loss of his personal stake in relation to when the court rules or could have ruled on Rule 23(c)(1) class "certification" misses the essential Article III mark. Continued personal stake by the representative in proper class suits is not the Article III requisite. *Sosna* v. *Iowa, supra.* Rather, where the representative initially has a justiciable claim, the question is whether the requisite concreteness of issues and adverseness of interests continue to exist in the class suit. Indeed, concreteness and adverseness are the very form and essence of class actions, and are embodied in the Rule 23(a) prerequisites.

1. Concreteness Of Issues Is Present Where The Facts Of The Representative's Initially Justiciable Claim Are Sufficiently Similar To The Absentees' Factual Circumstances.

Concreteness of issues is necessary to insure that a judicial decision is not rendered in a vacuum, as would be with an unripe case or an advisory opinion. *See Hall* v. *Beals*, 396 U.S. 45, 48 (1969). In class suits, the representative must have individual standing at the time of filing to satisfy Article III initially and must be a member of the class. *Sosna* v. *Iowa, supra*, 419 U.S. at 402-03; *O'Shea* v. *Littleton, supra*, 414 U.S. at 494; *Bailey* v. *Patterson*, 369 U.S. 31 (1962). These requirements, insuring that the case

is ripe and redressable through judicial process, function as the mold into which the court can fashion its legal construct. *See Kremens* v. *Bartley*, 431 U.S. 119 (1977).[2]

By filing a class complaint, the representative with individual standing brings absentees' interests before the court. *See McArthur* v. *Southern Airways, Inc.*, 556 F.2d 298 (5th Cir. 1977) (Rule 23(e) governs plaintiff's attempt to drop class allegations from complaint "as a matter of right" under Fed. Rule Civ. Proc. 15); 3B Moore's *Federal Practice* ¶ 23.50 at 23-423 (1978). The court can exercise its judicial power with respect to those interests only where a sufficient bond or "nexus" exists between the representative's facts and the absentees', so that reference to the representative's past injury focusses judicial attention on the absentees' circumstances as well. *See Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940) ("interests of those not joined [must be] of the same class as the interests of those who are"); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 387 & n.120 (1967) (interests must be "closely alligned"); Equity Rule 38 (1912) ("when the question is one of common or general interest to many persons constituting a class . . ."); *see generally* Newberg, *Newberg on Class Actions* 122-46 (1977).[3]

[2] The requirement for individual standing initially by the representative also helps protect against collusive suits favoring the defendant and screens out indifferent and barratrous volunteers, thereby contributing to adverseness of interests. See *pp.* 12-14, *infra.*

[3] A classic example of how this "nexus" element satisfies Article III concerns is the defendant class action, in which a plaintiff sues a defendant as representative of a defendant class of absentees with whom the plaintiff has no personal controversy cognizable under Article III. Where the defendant representative's and the absentees' circumstances are sufficiently close, a "juridical link" exists so that Article III justiciability is satisfied as to the absentees. *See Washington* v. *Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (plaintiffs in one prison could sue sheriffs and wardens in all state jails in challenge to segregation); *Kidd* v. *Schmidt*, 399 F. Supp. 301 (E.D. Wisc. 1975) (plaintiffs could sue all state officials authorized to admit persons to state and county institutions in challenge to civil commitment without a hearing); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

To satisfy this focussing element, current Rule 23(a)(2) and (3) require that the claims of the representative be "typical" of those of the class and that there are questions of law and fact "common" to the class. These Rule 23 elements insure that a court will not be rendering a decision "affect[ting] the rights" of absentees and "touching the[ir] legal relations" with the defendant, *North Carolina* v. *Rice, supra*, 404 U.S. at 246, without regard to the material facts of their circumstances. If these elements exist, the absentees' continued controversy with the defendant is brought into proper focus and the broad case, involving many persons and their interests, has concreteness. *Geraghty* v. *United States Parole Comm'n*, 579 F.2d 238, 250 (3d Cir. 1978).[4]

The connection between Rule 23(a)'s "nexus" requirements and Article III has been referred to by the Court

[4] The nature of the "nexus" aspect of Rule 23 is most clear in proper class suits for equitable relief under Rule 23(b)(2), where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." In such suits, the interests of class members and the representative necessarily have a greater "cohesiveness," *United States* v. *Alleghany-Ludlum Inds., Inc.*, 517 F.2d 826, 878 (5th Cir. 1975) ("the (b)(2) class is by definition a cohesive aggregate"), that permits a court to bind the class member by a judgment even without pre-judgment notice and the right to opt-out of the action. Rule 23(c)(2), (3); *Hansberry* v. *Lee*, 311 U.S. 32, 40-43 (1940); *Wetzel* v. *Liberty Mutual Ins. Co.*,

on several occasions. In *Kremens* v. *Bartley, supra,* the Court refused to adjudicate the constitutionality of Pennsylvania statutes governing the admission and commitment of minors to institutions, in light of statutory amendments during the pendency of the case that had mooted the personal claims of minors over 14, including all the representatives'. The amendments "fragmented" the class, 431 U.S. at 128, created an "obvious lack of homogeneity." *id.* at 130, and gave the Court "grave doubts" as to compliance with Rule 23(a) and thus justiciability under Article III. *See id.* at 129-30, 131 n.12, 134 n.15. In essence, the nexus between the representative's claims and the remaining absentees' was unclear, and so was the Court's Article III jurisdiction as a result.[5] *See* also *Hall* v. *Beals, supra* (in

508 F.2d 239, 254-57 (3d Cir.), *cert. den.*, 421 U.S. 1011 (1975); *see Quern* v. *Jordan*, ___ U.S. ___, 59 L.Ed.2d 358, 363 n.3 (1979). By definition, the defendant's conduct applies to all class members and subjects them all to the same continuing policy.

In class suits under Rule 23(b)(3), the existence of sufficient "nexus" to provide Article III concreteness may depend upon the type of suit. Where the action challenges or arises from a definite and uniform policy, such as the legality of a printed form, computer calculation, or undisputed practice, e.g., *Roper* v. *Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), *cert. granted*, No. 78-904 (Mar. 5, 1979) (legality of uniform interest computation method), the action is identical to a (b)(2) class suit except that only damages for past injury rather than equitable relief against future conduct is involved. *See Airline Stewards, etc.* v. *American Airlines, Inc.*, 490 F.2d 636, 646 (7th Cir. 1973), *cert. den.* 416 U.S. 993 (1974) (suit for both injunctive and monetary relief certified under (b)(2) should be recertified under (b)(3) when injunctive relief claim becomes moot). However, when the defendant's conduct is more individualized, and the class suit is a mere conglomeration of claims, the "nexus" most likely will be lacking.

[5] If concreteness is obscured because the issues in the case have been so altered that the named representative was never a member

challenge to six months residency requirement for voter registration, statutory amendment reducing residency period to two months destroyed class cohesiveness, rendering action moot).

Similarly, in *Gerstein* v. *Pugh, supra,* 420 U.S. at 110 n.11, a challenge to pretrial detention procedures, the court emphasized that the "constant existence of a class of persons suffering the deprivation is certain" in rejecting a mootness claim. The certainty that the absentees' suffered and will suffer the same deprivation suffered by the representative gave the case the requisite concreteness. *Compare Board of School Comm'rs* v. *Jacobs,* 420 U.S. 128 (1975) (per curiam) (case moot where no class was defined and the focus of the class suit, a student newspaper, had ceased publication entirely). *See also Roper* v. *Consurve, Inc.,* 578 F.2d 1106, 1111 (5th Cir. 1978), *cert. granted,* No. 78-904 (Mar. 5, 1979) (representative who was offered full relief maintained sufficient nexus with class members to satisfy Article III).[6]

of the class whose claims remain to be adjudicated, and as long as the class claim is properly before the court either through previous certification or appeal of the failure to certify, *see* pp. 14-19 *infra,* the reviewing court should remand for substitution of a new representative. *Kremens* v. *Bartley, supra,* 431 U.S. at 134-35; *cf. Goodman* v. *Schlesinger,* 584 F.2d 1325, 1332-33 (4th Cir. 1978). In such cases, notice should be sent to the absentees to inform them of the status of their rights. *See Quern* v. *Jordan,* ___ U.S. ___, 59 L.Ed.2d 358, 362-64 (1979); *Shelton* v. *Pargo, Inc.,* 578 F.2d 1298 (4th Cir. 1978); Rule 23(d)(2).

[6] The Court has applied the same principle in the context of Article III taxpayer "standing," holding that there must be a "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. 83, 102 (1968); *Schlesinger* v. *Reservists to Stop the War,* 418 U.S. 208, 227-28 (1974).

Clearly, the nexus between the representative's facts and the absentees', and thus Article III concreteness, does not depend at all on whether or even when the representative loses his personal stake. It is a function of the facts giving rise to the representative's initial injury as compared to the absentees' circumstances, i.e. initial standing and "commonality" and "typicality." Subsequent developments not pertaining to this nexus may moot the representative's personal claim but are irrelevant to Article III concreteness.[7]

2. Adverseness Of Interests Is Present Where There Is Vigorous Representation Of The Interests Of Absentees With A Continuing Stake In The Defendant's Challenged Policy.

Article III requires that the issues be presented in an adversary context to sharpen the issues and to insure against collusive suits. *Flast* v. *Cohen, supra,* 392 U.S. at 95. In class actions, due process mandates that the absentees' interests be adequately represented before the absentees can be bound by a judgment. *Hansberry* v. *Lee, supra.* Rule 23(a)(4)'s adequate representation prerequisite imposes on the representative and class counsel a strict obligation to vigorously assert the class members' interests to bring those interests fully to the court's attention. E.g., *Gonzales* v. *Cassidy,* 474 F.2d 67, 72 (5th Cir. 1973); *Mersay* v. *First Republic Corp. of America,* 43 F.R.D. 465, 470

[7] Similarly, the nexus and Article III concreteness do not depend on whether the representative loses his personal stake through elapse of time, conduct of the defendant or even interim court order. *See Roper* v. *Consurve, Inc., supra; Frost* v. *Weinberger,* 515 F.2d 57 (2d Cir. 1975).

(S.D.N.Y. 1968).[8] To be a proper class suit, adequate representation must persist throughout the litigation, including the appellate stage. *Gonzales* v. *Cassidy, supra.*

It is clear from *Sosna* and subsequent decisions that adverseness of interests in a class action can be present without regard to the representative's loss of his personal stake as long as the class counsel still vigorously asserts the class members' interests. In *Sosna,* the class counsel "competently argued [the interests of the class] at each level of the proceeding;" despite the absence of a representative with a live stake on appeal, Rule 23(a) was satisfied and the case was not moot. 419 U.S. at 403. In *Franks* v. *Bowman Transp. Co., supra,* 424 U.S. at 756, the Court found the case still presented a live controversy because, in part, "No questions [were] raised concerning the tenacity and competence of the [class] counsel . . . ." Indeed, the Court specifically held that the representation of the claims of the unnamed class members presented the "adversary relationship" to confer Article III justiciability. *Id.* at 755-76. And in *Gerstein* v. *Pugh, supra,* 420 U.S. at 110 n.11, the

[8] *Hansberry* v. *Lee* shows the congruence of adequate class representation and Article III adversity. An earlier suit to enforce a racially restrictive covenant had been brought as a class action on behalf of all affected landowners. The parties to that class suit stipulated that 95 percent of the landowners signed the covenant, as required by its terms, and the state court upheld the covenant's validity. The *Hansberry* suit was brought to enforce the covenant against blacks who acquired land in violation of the covenant. The *Hansberry* state court found that the stipulation was "false and fraudulent," 311 U.S. at 38, but nonetheless gave res judicata effect to the earlier class suit judgment. The Court held the earlier judgment was not binding in light of the inadequate representation of absentees' interests precisely because the earlier suit was a "collusive" suit brought against "nominal defendants." *Id.* at 45-46.

lack of a representative with a live claim was no bar to Article III justiciability where "the attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing interest in the case," presumably whose interests he was advocating.

Thus, just as the Rule 23(a) class prerequisites can continue to be satisfied despite the loss of a representative with a personal stake, *Sosna* v. *Iowa, supra; Gerstein* v. *Pugh, supra,* the Article III elements of concreteness of issues and adverseness of interests, embodied in the same Rule 23(a) prerequisites, can obtain without regard to a continuing live interest by the representative. Where the class action is a proper class action, that is, "certifiable" pursuant to Rule 23, Article III's elements will necessarily be present and the case will not be moot.

3. Article III Justiciability Is Not Determined By Whether Class "Certification" Was Properly Ordered Or Was Denied.

As long as the absentees in a class suit are provided due process, the Constitution does not require any particular class action procedure, including Rule 23(c)(1) "certification," to enable the court to reach the merits of the absentees' claims and bind them by judgment. *Richardson* v. *Ramirez,* 418 U.S. 24, 39 (1973); *Hansberry* v. *Lee, supra,* 311 U.S. at 42-43. Indeed, class actions derive from old English equity courts, *see* 3B Moore's *Federal Practice* ¶ 23.02[1] at 23-36 (1978) and have been expressly recognized by the Court as a federal procedural device for well over one hundred years. *Smith* v. *Swormstedt,* 57 U.S. (16 How.) 288 (1853). Class "certification" and class "denial"

are but creatures of current Rule 23 procedure, existing but 13 years, and thus not Article III mandates. *Compare* Rule 23(c)(1) *with* Equity Rule 38 (1912); *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921); *Smith* v. *Swormstedt, supra.* Consequently, a court order pursuant to Rule 23(c)(1) "certifying" the class is not grounded in Article III and alone cannot confer Article III jurisdiction. *See Zahn* v. *International Paper Co.,* 414 U.S. 291 (1972); *Snyder* v. *Harris,* 394 U.S. 322 (1969); Fed. Rule Civ. Proc. 83 (Rule 23 cannot enlarge Article III jurisdiction); *see also Sosna* v. *Iowa, supra,* 419 U.S. at 413-14 (White, J. dissenting).[9]

Rule 23(c)(1) "certification" is a procedure designed "to give clear definition to the class . . . ." *Advisory Committee's Note to Amended Rule 23,* 39 F.R.D. 98, 104 (1966). It is useful for aiding the courts, the parties, and interested persons in determining the scope and res judicata effect of the judgment in a class suit.[10] In a subsequent

[9] Certainly, as an order that Rule 23(a)'s elements are satisfied, at least conditionally, the "certification" order confirms that concreteness of issues and adverseness of interests are present, *see* pp. 7-14 *supra,* and is therefore sufficient to permit the suit to proceed without regard to the representative's personal stake. *Sosna* v. *Iowa, supra; Gerstein* v. *Pugh, supra; Swisher* v. *Brady, supra.* However, this is not to say that the "certification" order itself confers Article III justiciability. It is but an appropriate proxy for the existence of concreteness and adverseness that a court can use to avoid extended inquiry into Article III issues in every class action whenever the representative loses his personal stake. In other words, if the class is certified, and the court is convinced the certification continues to be proper, the class action necessarily has concreteness and adverseness, inasmuch as Rule 23(a) embodies Article III justiciability; the court need pursue the matter no further.

[10] The early nature of the Rule 23(c)(1) certification order is designed to avoid the prejudice of "one-way intervention" and to

suit based on similar claims, the court is better able to determine what was adjudicated and on whose behalf where there is a clear class order. *See Berry Petroleum Co.* v. *Adams & Peck,* 518 F.2d 402, 411 (2d Cir. 1975); Note, *Collateral Attack on the Binding Effect of Class Action Judgment,* 87 Harv. L. Rev. 589 (1974). Importantly for the representative, a "certification" order is a procedural requirement of the Federal Rules of Civil Procedure that must be complied with before the court can address the merits of the absentees' claims.[11]

Similarly, denial of the representative's Rule 23(c)(1) motion to have the class "certified" is only a procedural ruling under current federal practice that the representative has not shown compliance with Rule 23(a) and (b). Without any further order under Rule 23(c)(1), the action cannot gain the status of a "certified" Rule 23 class action so that the absentees' claims can be adjudicated. The court's denial of the Rule 23(c)(1) motion does no more. Only if such an order automatically and irrevocably extinguishes the class issues from the suit entirely in every respect can it affect justiciability. But this Court has consistently held that class denial does not eliminate the class issues from the case entirely.[12]

aid the court in directing the course of the proceeding. *See American Pipe & Construction* v. *Utah,* 414 U.S. 538, 545-49 (1974). However, especially in 23(b)(2) actions, early certification is not mandatory. *Jiminez* v. *Weinberger,* 523 F.2d 689, 700 (7th Cir. 1975); 3B Moore's *Federal Practice* ¶ 23.50 at 23-430 to 23-432 (1978).

[11] Thus, if the district court fails to properly certify the class pursuant to Rule 23(c)(1), and that failure is not appealed by the representative as error, the appellate court cannot address the merits of the class members' claims. *See Board of School Comm'rs* v. *Jacobs,* 420 U.S. 128 (1975).

In the companion cases of *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978) and *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978), concerning the interlocutory appealability of orders denying motions for class certification, the Court held that such an order "is subject to revision" and "inherently tentative," *Coopers & Lybrand,* 437 U.S. at 469 & n.11, and has no "irreparable effect" on the class claims in the suit. *Gardner,* 437 U.S. at 480. In *Gardner,* the Court adopted the Court of Appeal's language that "If, after final judgment the [injunctive] relief granted is deemed unsatisfactory [to protect the class members], the question of class status is *fully* reviewable." *Id.* at 480 n.6 (emphasis added), quoting from 559 F.2d 209, 212 (3d Cir. 1977).

In *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), the Court ruled that an unnamed class member could intervene after final judgment to appeal the earlier express class denial, even though the named plaintiffs had received

[12] The reference in the *Advisory Committee's Note to Amended Rule 23,* 39 F.R.D. 98, 104 (1966) that the case is "stripped of its character as a class action" by a class denial clearly does not pertain to Article III justiciability or preservation of the class claims for appeal. The same paragraph expressly points to "the laws governing jurisdiction" and other matters for the answers to such questions. The intent by this reference was that the class denial affirmatively relieves the court and the plaintiff of their obligations to the absentees. *See United Airlines, Inc.* v. *McDonald, supra,* 432 U.S. at 393; *compare Pearson* v. *Ecological Science Corp.,* 522 F.2d 171, 177-78 (5th Cir. 1975), *cert. den.,* 425 U.S. 912 (1976) (parties' individual settlement after class denial not subject to Rule 23(e)) with *McArthur* v. *Southern Airways, Inc., supra* (attempt to drop class allegations pursuant to Rule 15 before defendant filed answer was subject to Rule 23(e)).

all the relief they sought for themselves. The Court held that "The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs . . . ." 432 U.S. at 393.[13] If the class denial had extinguished the class claims entirely, the plaintiffs' receipt of all their relief would have precluded any further pursuit of the class issues in that litigation.

East Texas Motor Freight Systems, Inc. v. *Rodriguez*, 431 U.S. 395 (1977) is in accord. There, the district court denied the class and found that the representatives suffered no injury from the challenged discriminatory practices. The representatives did not appeal the loss of their individual claims, 431 U.S. at 401, but appealed only the class denial. On review, neither the Fifth Circuit nor this Court suggested that a representative without a live personal claim could not appeal the class denial, but proceeded to analysis of the Rule 23 elements. Again, the class denial was preserved through appeal. *See* also *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 897-98 (5th Cir. 1977); *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 919 n.7 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977) (class denial in Title VII suit does not strip case of its class character so entirely that class members are barred from intervening thereafter to prosecute their individual claims even though they did not

[13] This holding was essential to the ruling; if the named plaintiff could not appeal the class denial upon final judgment, an unnamed class member would have had to intervene upon class denial to protect his own interests, and the move to intervene after final judgment would have been untimely. The Court characterized this as "[t]he critical factor." 432 U.S. at 394

satisfy the administrative exhaustion requirements of Title VII).[14]

C. The Representative In A Proper Class Suit Need Have No Personal Stake In The Class Claim To Appeal The Class Denial.

The ability of a representative to appeal the class denial upon final judgment, *Coopers & Lybrand* v. *Livesay, supra; Gardner* v. *Westinghouse Broadcasting Co., supra,* is not at all based on the representative's having a personal stake in the class claim. Indeed, except possibly in the rare class

[14] There are also strong policy reasons for preserving the potential class claims through final appeal of the class denial. If denial irretrievably extinguishes the class claims from the suit, trial courts would be constrained to certify questionable classes to preserve the class claims, thereby prejudicing the defendant. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. den.*, 419 U.S. 885 (1974) (test case may be superior to certification). Class denial would be unreviewable both as a matter of Article III justiciability, and as a practical matter because of the almost certain running of the statute of limitations until final review is possible. *See Gelman* v. *Westinghouse Electric Corp.*, 556 F.2d 669, 701 (3d Cir. 1977); *Esplin* v. *Hirschi*, 402 F.2d 94, 101 n.14 (10th Cir. 1967), *cert. den.*, 394 U.S. 928 (1969). Interlocutory appeal from the class denial might be necessary. *cf. Coopers & Lybrand* v. *Livesay; Gardner* v. *Westinghouse Broadcasting Co.* Absentees would have to intervene or file new suits at an early stage to protect their interests. *See United Airlines, Inc.* v. *McDonald.* The judicial economy inherent in class actions would be wasted. *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974).

Where the mootness occurs prior to class denial, judicial economy would seem to demand preservation of the class claims. Otherwise, class members would have to intervene immediately upon filing of the class suit to protect their interests.

suit where the absentees are true indispensible parties, the representative never has a legally cognizable personal stake in the class claim at all.[15]

Adding class allegations to the complaint gains nothing personally for the representative; the representative cannot gain by the class device what he cannot do on his own. *Schlesinger* v. *Reservists Committee to Stop the War,*

[15] Defendant class actions are no exception. In such actions, where the plaintiff has a claim against all defendants, the class device is used by the plaintiff merely to join all the plaintiff's claims in one suit. *See United States* v. *Truckee-Carson Irrigation District,* 71 F.R.D. 10 (D.Nev. 1975); *United States* v. *Trucking Employers, Inc.,* 72 F.R.D. 101 (D.D.C. 1976). The plaintiff is not the representative at all. The named defendant may be required to be a representative over his objection and without any personal stake in the absentees' claims. *United States* v. *Trucking Employers, Inc., supra; Hopson* v. *Schilling,* 418 F.Supp. 1223, 1237 (N.D.Ind. 1976); *Thompson* v. *Bd. of Ed.,* 71 F.R.D. 398, 407 n.13 (W.D.Mich. 1976). From the plaintiff's perspective, the defendant class action is merely a variation of the interpleader procedure, where all claims *adverse* to the plaintiff can be adjudicated in one suit.

Indeed, class suits where the absentees are indispensable parties are similar to defendant class actions in this respect. The representative's personal interest in the class suit is merely to overcome judicial reluctance to adjudicate suits directly affecting the rights of persons not represented in the proceeding. The representative has no personal stake in the absentees' claims, merely an interest in the procedural device as a means of securing an adjudication of his personal claim. *See* 3B Moore's *Federal Practice* ¶ 23.02[1] at 23-36 to 23-38 (the class action in English equity was both an escape from and an adjustment to the rule of compulsory joinder). Absent this judicial reluctance, the would-be representative could receive a decree fully satisfying his personal interest without resort to the class suit. *See* Rule 23(b)(1)(A) (focus on rights of party opposing the class) and Rule 23(b)(1)(B) (focus on interests of absent class members), neither of which is concerned with the rights or stake of the representative.

supra, 418 U.S. at 216; *O'Shea* v. *Littleton, supra,* 414 U.S. at 494. In *Sosna, Gerstein, Swisher* and *Franks,* each representative could have secured full individual relief, that is, a judgment enjoining the residency requirement for a divorce, the pretrial detention procedures, the state's ability to make exceptions to the juvenile master's findings, and the trucking company's seniority rules, each as applied to him or her personally, without any need for the class action device.[16] Yet, the court could adjudicate the absentees' claims because of the "recognized exception" in representative suits to the due process principle that a court has no jurisdiction to bind a person by judgment unless he is personally before the court. *Hansberry* v. *Lee, supra,* 311, U.S. at 41.

Without a personal stake in the class claim, the representative cannot possibly have a personal stake in the appeal of the class denial. A party cannot appeal a judgment where he can gain nothing legally cognizable from the appeal. *New York Telephone Co.* v. *Maltbie,* 291 U.S. 645 (1934) (utility that secured permanent injunction against enforcement of rate orders could not appeal portions of the decree); *Bogus* v. *American Speech & Hearing Ass'n,* 582

[16] Obviously, there are advantages to a person in bringing a class suit. His claim or interest usually is too insubstantial to warrant the enormous expense to him personally of litigation, and no attorney will accept the suit without the prospect of fees from the class recovery. *See Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 266 (1972). A person may have an interest in seeking redress for other people or deterring fraud or illegal conduct in the market place. *See* generally Kalven & Rosenfeld, *The Contemporary Function of the Class Suit,* 8 U.Chi.L.Rev. 684 (1941). However, none of these advantages is a legally cognizable interest that could be asserted judicially or grant Article III jurisdiction. *See Warth* v. *Seldin, supra; O'Shea* v. *Littleton, supra.*

F.2d 277, 291 (3d Cir. 1978) (party could not appeal denial of others' motion to intervene); Wright, Miller & Cooper, 15 *Federal Practice & Procedure* § 3902 (1976).[17]

Thus, in *Coopers & Lybrand* v. *Livesay, supra,* a suit brought under Rule 23(b)(3) for damages for violations of the federal securities laws, the representative's claim was entirely distinct from every class members', and the representative could pursue and secure full individual monetary relief without the class claim. Yet, the representative's ability to file the suit as a class action and appeal the class denial after final judgment was never in doubt. Whether Livesay wins on his individual claim through adjudication, loses on the claim, or receives full relief by settlement will have no affect on either his personal stake in the class claim or his ability to appeal the class denial.[18]

In *Gardner* v. *Westinghouse Broadcasting Co., supra,* the class denial had no adverse effect on the scope of injunctive relief the representative could secure to enforce her individual interests if she prevailed on her individual

[17] While there can be an exception for a judgment having adverse res judicata or collateral estoppel significance, *see Electric Fittings Corp.* v. *Thomas & Betts Co.,* 307 U.S. 241 (1939) (patent infringement suit by patent holder; defendant who prevailed on finding of no infringement can appeal judgment because holding of patent validity has res judicata effect), class denial has no res judicata effect. *Pearson* v. *Ecological Science Corp., supra,* 552 F.2d at 177-78; *see Coopers & Lybrand* v. *Livesay, supra; Gardner* v. *Westinghouse Broadcasting Co., supra.*

[18] The outcome on the representative's individual claim certainly may have a bearing on his ability to represent the class under Rule 23. *East Texas Motor Freight Systems, Inc.* v. *Rogriguez, supra.* But this is an issue of compliance with Rule 23(a)'s strict adequacy of representation requirement, not Article III justiciability. *See id.* (Article III not raised where representatives appealed class denial after loss on merits of individual claims).

claim. Thus, whether she wins or loses on her personal claim does not affect her lack of legally cognizable interest in the class denial. *See also United Airlines, Inc.* v. *McDonald, supra* (successful representative could appeal class denial); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez, supra* (unsuccessful representatives appealed class denial); *Gonzales* v. *Cassidy, supra* (fully successful representative has continuing duty to class members to pursue their interests through appeal).[19]

D. The Court's Class Action Decisions Demonstrate Clearly That The Representative Need Not Have A Personal Stake At The Time Of Certification, Irrespective Of Whether The Motion For Class Certification Was Previously Denied.

On four occasions this Court has expressly recognized that federal courts are not divested of Article III justiciability merely because the representative in an action filed as a class action but not yet certified as such loses his personal stake in the controversy.

In *Gerstein* v. *Pugh, supra,* the court approved certification of the class and rejected a claim of mootness despite the absence of any showing in the record that any of the named plaintiffs was still in custody awaiting trial at the

[19] Thus, Petitioners entirely miss the mark in attempting to distinguish *McDonald* by suggesting that a representative who has secured full individual relief "suffered from the adverse class determination" only where, as in *McDonald,* that relief was, or may have been, secured by judgment. Pet.'s Brief at 37-39. Not only is there no support in any class action decision for this distinction, but no representative "suffers" from a class denial in any sense of legal injury in fact, regardless of whether the representative prevails individually by judgment, loses on the merits, or receives full satisfaction in other ways.

time of certification.[20] In *Swisher* v. *Brady, supra,* the Court held that the fact that none of the named plaintiffs was still subjected to possible double jeopardy "did not deprive the District Court of the power to certify the class action when it did and that, accordingly, a live controversy presently exists between the unnamed class members and the State." In *United Airlines, Inc.* v. *McDonald, supra,* the potential class claims survived both express denial and full satisfaction of the representatives' individual claims to permit intervention by an unnamed class member upon final judgment to appeal the class denial.

Similarly, in *Richardson* v. *Ramirez, supra,* 418 U.S. at 33-40, a California state court class suit brought by three ex-felons challenging the constitutionality of their disen-

[20] Petitioners argue that only "capable of repetition, yet evading review" class actions can survive pre-certification mooting of the representative's claim. Pet.'s Brief at 31-36. However, *Franks* v. *Bowman Transp. Co., Inc., supra,* 424 U.S. at 756 n.8, clearly rejects this claim: "Thus, the 'capable of repetition, yet evading review' dimension of *Sosna* must be understood in the context of mootness as one of the policy rules often invoked by the Court . . . [which] find their source in policy, rather than purely constitutional considerations.' *Flast* v. *Cohen,* 392 U.S. 83, 97 (1968)." *See also id.* at 781 (Powell, J., concurring in part) (the doctrine is "only a factor in our discretionary decision whether to reach the merits of an issue, rather than an Art. III 'case or controversy' requirement."). Furthermore, Petitioners' assertion that the doctrine applies in class actions, as in non-class actions, only "because the named plaintiff's claim itself may be adjudicated," Pet.'s Brief at 32, flies in the face of *Sosna,* where the Court specifically found that Mrs. Sosna's claim was moot and applied the doctrine to the absentees' claims. 419 U.S. at 400; *id.* at 411 (White, J., dissenting). Thus, in *Sosna,* as in *Gerstein* and *Swisher,* the case would have been moot but for its class nature. *See also United Airlines, Inc.* v. *McDonald, supra,* clearly not a "repetition/evasion" case.

franchisement, the Court expressly held that the defendant's acquiescence to the representatives' individual claims before the state court reached either the class issue or the merits did not moot the case. The Court found a live controversy between the class members and the defendants despite the hiatus between this loss of personal stake and any judicial recognition of the action as a class action.[21]

Thus, neither loss of the representative's personal stake prior to judicial recognition of the action as a class action, as in *Gerstein, Swisher* and *Richardson*[22] nor express class denial and subsequent loss of any personal stake in further relief, as in *McDonald,* moots the case filed and vigorously prosecuted as a class action.

The three cases where the Court found the class claims moot after the representative's claim became moot are entirely consistent. In *Board of School Comm'rs* v. *Jacobs, supra,* the district court's failure to comply with Rule 23(c)(1) in ruling on class status was not assigned as error. As a result, the Court did not have the class before it as a matter of federal procedure, and absent a live plaintiff, the case was moot.

[21] Although *Richardson* was a state court case, and the state was "at liberty to prescribe its own rules for class actions," those rules were "subject . . . [to] the United States Constitution," 418 U.S. at 39, and could not confer on this Court an otherwise absent Article III jurisdiction.

[22] The dicta in *Sosna* v. *Iowa, supra,* where the representative's claim was clearly alive at certification, 419 U.S. at 398, that the named plaintiff must have a live controversy "at the time the class action is certified by the District Court pursuant to Rule 23," *id.* at 402, was "drained" of its "apparent force" by *Gerstein, Swisher,* and *McDonald. See Frost* v. *Weinberger,* 515 F.2d 57, 64 (2d Cir. 1975). Even *Sosna* itself recognized that this dicta was not mandated by Article III. 419 U.S. at 402 n.11.

As an Article III case, *Jacobs* can be best understood in terms of concreteness of issues and adverseness of interests. The failure of counsel to seek a proper class certification, 420 U.S. at 130, or pursue the issue on appeal, cast serious doubt on the adequacy of representation under Rule 23(a)(4) and thus Article III adverseness. *See East Texas Motor Freight Systems, Inc.* v. *Rodriguez, supra,* 431 U.S. at 404-05. More importantly, *Jacobs* was a First Amendment case involving the rights of students to control the contents of a student newspaper. 420 U.S. at 129. When the individual students involved graduated *and* the newspaper ceased publication, 420 U.S. at 133 (Douglas, J., dissenting), the case became hopelessly diffused. The absence of any focus for the Court to measure the First Amendment issues deprived the suit of any concreteness of issues.[23]

In *Weinstein* v. *Bradford,* 423 U.S. 147 (1975) (per curiam), the class representative filed with the Court a suggestion of mootness, thereby abandoning the class claims and eliminating the potential adverseness of interests. While the case was brought as a class action, it was neither certified as such under Rule 23(c)(1) nor prosecuted to this Court as such, and was properly treated as a non-class action. *Pasadena City Bd. of Ed.* v. *Spangler,* 427 U.S. 424 (1976) is similar. There the purported representative did not raise in this Court as error the failure of the lower court to comply with Rule 23(c)(1).

[23] *Franks* v. *Bowman Transp. Co., Inc., supra,* also sharply reduces any force of the particular *Jacobs* language. *Jacobs* stated that the case is moot "unless it was duly certified as a class action . . . *and* the issue is capable of repetition yet evading review." 420 U.S. at 129 (emphasis added). As discussed in note 20 *supra, Franks* laid to rest this postulation of the mootness doctrine in class actions.

In any event, because the United States had intervened as a party, the liveness of the class claims was irrelevant to the Court's reaching the merits. 427 U.S. at 430.

II. APPLYING THESE PRINCIPLES TO THIS CASE DEMONSTRATES THAT THE CLASS CLAIMS HERE IN ALL LIKELIHOOD ARE NOT MOOT; THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A CLASS ACTION DETERMINATION AS THE COURT OF APPEALS DIRECTED.

Both concreteness of issues and adverseness of interests almost certainly remain in this case. Respondent was a prisoner affected by the allegedly illegal parole guidelines in the same way as all prisoners sentenced under the same statute as Respondent and whose "customary release dates" fall beyond their sentence period.[24] Current prisoners and future prisoners in that category continue to be and will continue to be similarly affected by the guidelines. The legality of the guidelines under the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 and the ex post facto prohibition of the Constitution is an issue uniform to all such prisoners and does not turn on factual variations in the absentees' circumstances. *Geraghty* v. *U.S. Parole Comm'n, supra,* 579 F.2d at 252. Thus, those prisoners' rights can be adjudicated with reference to Respondent's facts at the time of filing. *Sosna* v. *Iowa, supra; Gerstein* v. *Pugh, supra.* Counsel's continued vigorous advocacy of their interests, *Geraghty* v. *U.S. Parole Comm'n,*

[24] This is the smallest class Respondent could represent under the Court of Appeals' analysis. *Geraghty* v. *United States Parole Comm'n, supra,* 579 F.2d at 253-54.

579 F.2d at 252, provides the requisite adverseness of interests. *Franks* v. *Bowman Transp. Co., Inc., supra.*

Neither Respondent's release from prison nor the district court's order denying the motion to certify the class under Rule 23(c)(1) alters any of these facts. Thus, the class claim, preserved for appellate review of the class denial order, is appropriate for adjudication and not moot if this suit is a proper class action. The case should be remanded to the district court for determination of the class action question pursuant to Rule 23(c)(1) in light of the Court of Appeals' directives.[25]

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[25] *Amici* do not address whether this is in fact a proper class action.

As to *Deposit Guaranty National Bank* v. *Roper*, No. 78-904, this analysis strongly suggests that the case was not mooted by the defendant's tender of full damages to the named plaintiffs after class denial. The class denial was based neither on a lack of nexus between the representative's claim and the absentees' nor on the vigorousness of class counsel's advocacy of the absentees' interests. *Roper* v. *Consurve, Inc., supra,* 578 F.2d at 1111-12.

CONCLUSION

Amici respectfully suggest that the judgment of the Court of Appeals that the case is not moot should be affirmed.

Respectfully submitted,

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